No. 81-2108

Office - Supreme Court, U.S.
FILED
MAY 13 1982
CLERK

In The

Supreme Court of the United States

October Term, 1981

JUAN CORCHADO,

Petitioner,

vs.

PUERTO RICO MARINE MANAGEMENT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BERNARD ROLNICK
Attorney for Petitioner
Counsel of Record
299 Broadway
New York, New York 10007
(212) 962-1300

PETER J. DEAN
JANE ROLNICK GOLDBERG
Of Counsel

6159 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 542-1114

QUESTIONS PRESENTED

1. Where in a Jones Act case, the district judge has dismissed the case, without a hearing, pursuant to Rule 37(b) of the Federal Rules of Civil Procedure, so as to deprive the seaman of his remedies under the statute, and has further denied, without a hearing, the plaintiff's Rule 60(b) motion for reconsideration, was there such complete absence of probative facts and mitigating circumstances essential to warrant the imposition of dismissal as a "just" sanction within the due process requirements of Rule 37(b) so as the lead the court of appeals to find that the district judge had not abused his discretion?

2. If the court of appeals erred in holding that there was no abuse of discretion by the district court, should the case be remanded for a hearing on the issues or otherwise be restored to the trial calendar?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Citations iii

Opinions Below 1

Jurisdiction 2

Statutory Provisions Involved 3

Statement of the Case 3

Preliminary Statement 3

Statement of Facts 4

Reasons for Granting the Writ:

I. There is a conflict among the circuits as to the proper standards and procedures which must precede imposition of dismissal under Rule 37(b) of the Federal Rules of Civil Procedure in order to safeguard a litigant's due process rights. 8

II. The decision below raises a serious problem with respect to the proper application of Rule 37(b) to cases involving the rights and remedies of American merchant seamen who have been, historically, wards of the court and are specially protected by federal law. 11

Conclusion 13

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 360 (1962) 13

Braen v. Pfeiffer Oil Transport Co., Inc., 361 U.S. 129 (1959) 13

Butler v. Pearson, 636 F. 2d 526 (D.C. Cir. 1980) 10

EEOC v. Carter Carburetor, 577 F. 2d 43 (8th Cir. 1978), cert. denied, 439 U.S. 1081 (1979) 11

Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957) 13

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 12

Hammond v. Arkansas, 212 U.S. 322 (1908) 9

Harden v. Gordon, 11 F. Cas. 480 (c.c. Me. 1823) 12

Hovey v. Elliott, 167 U.S. 409 (1897) 9

Jacob v. New York City, 315 U.S. 752 (1942) 13

Johannssen v. Gulf Trading & Transportation Co., 633 F. 2d 653 (2nd Cir. 1980) 13

Contents

Page

Joplin v. Southwestern Bell Telephone Company, 671 F. 2d 1274 (10th Cir. 1982) 10

Kenney v. California Tanker Company, 381 F. 2d 775 (3rd Cir. 1967) 12

Langnes v. Green, 282 U.S. 531 (1931) 10

Link v. Wabash Railroad Company, 370 U.S. 626 (1962) 9

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 8, 9

Nealy v. Transportacion Maritima Mexicana, 630 F.2d 694 (9th Cir. 1980) 11

Oil, Chemical & Atomic Workers International v. Mobil Oil Co., 426 U.S. 407 (1976) 12

Rogers v. Kroger Company, 669 F.2d 317 (5th Cir. 1982) 10, 11

Schenck v. Stearns, 583 F.2d 60 (2nd Cir. 1978) 11

Societé Internationale v. Rogers, 357 U.S. 197 (1958) 9, 10

Torino v. Texaco, Inc., 378 F.2d 268 (3rd Cir. 1967) 12

Universal Oil Products Co. v. Root Refining Co., 326 U.S. 575 (1946) 9

Contents

Page

Statutes Cited:

The Jones Act, 46 U.S.C. §688 ..... 3, 4, 13

28 U.S.C. §636(b)(1) 3, 6

28 U.S.C. §1254(1) 3

28 U.S.C. §1916 3

United States Constitution Cited:

Fifth Amendment 3

Rules Cited:

Federal Rules of Civil Procedure:

Rule 37 ..... 10, 11

Rule 37(b) ..... i, 3, 8, 9, 11

Rule 41(b) 3, 8, 9, 12

Rule 52(b) 8

Rule 60(b) ..... i, 3, 6, 7, 9

Other Authorities Cited:

7 Moore, Federal Practice, ¶60.22 (1979) 9

1 Norris, Law of Seamen, 3rd Ed. §503 (1970) 12

Contents

Page

Renfrew, Discovery Sanctions, 67 California Law Rev. 1062 (1979) 10

APPENDIX

Order of the United States Court of Appeals for the First Circuit Dated February 1, 1982..... 1a

Order of the United States Court of Appeals for the First Circuit Dated January 15, 1982..... 3a

Opinion of United States Court of Appeals for First Circuit Dated December 8, 1981 ..... 4a

Order of the United States District Court for the District of Puerto Rico Dated April 13, 1981 ..... 13a

Order of the United States District Court for the District of Puerto Rico Dated February 11, 1981 ..... 16a

Magistrate's Report of Recommendation of the United States District Court for the District of Puerto Rico Dated January 26, 1981..... 19a

Geigel's Motion for Reconsideration Dated March 3, 1981 ..... 22a

Docket Entries of the United States District Court, District of Puerto Rico 26a

Relevant Constitutional and Statutory Provisions 34a

No.

In The

Supreme Court of the United States

October Term, 1981

JUAN CORCHADO,

Petitioner,

vs.

PUERTO RICO MARINE MANAGEMENT, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Juan Corchado, the petitioner herein prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in the above entitled case on December 8, 1981.

OPINIONS BELOW

1. First Circuit Court of Appeals Order Denying Rehearing *En Banc* dated and entered February 1, 1982 is printed in the appendix hereto, *infra,* page 1a. It is not officially reported.

2. First Circuit Court of Appeals Order Denying Rehearing dated and entered January 15, 1982 is printed in the appendix hereto, *infra*, page 3a. It is not officially reported.

3. First Circuit Court of Appeals Opinion and Judgment affirming District Court Order dated and entered December 8, 1981 is printed in the appendix hereto, *infra*, page 4a. It is officially reported at 665 F.2d 410.

4. District Court Order dated April 13, 1981 denying reconsideration is printed in the appendix, *infra*, page 13a. It is not officially reported.

5. District Court Memorandum and Order dated February 11, 1981 is printed in the appendix hereto, *infra*, page 16a. It is not officially reported.

6. Magistrate's Report and Recommendation dated January 26, 1981 to dismiss the case is printed in the appendix hereto, *infra*, page 14a. It is not officially reported.

JURISDICTION

1. The judgment of the United States Court of Appeals for the First Circuit was made, entered and filed on December 8, 1981. A timely petition for rehearing was denied on January 15, 1982. A similar petition for rehearing *en banc* was denied on February 1, 1982.

2. The time for filing this petition would ordinarily have expired within ninety days from January 15, 1982.

3. By order dated April 1, 1982, the Honorable Mr. Justice J. Brennan, Jr., Circuit Judge for the First Circuit granted an

extension of time until May 15, 1982. This petition for certiorari is filed within that time.

4. This is an action by an American seaman pursuant to 28 U.S.C. §1916 providing for waiver of prepayment of fees and costs.

5. This Court's jurisdiction is invoked under 28 U.S.C. §1254(.).

STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, the Jones Act (46 U.S.C. §688), the Magistrate's Act (28 U.S.C. §636(b)(1), and the Federal Rules of Civil Procedure, Rules 37(b), 41(b), and 60(b) are printed in the appendix annexed hereto, *infra,* at pages 34a-40a.

STATEMENT OF THE CASE

Preliminary Statement

This case arises out of the dismissal of a seaman's action by a district judge because of the failure of his attorneys to fully comply with the orders of the court as to discovery and their failure to attend a pretrial conference. This is not a case wherein the injured petitioner failed to prosecute his claim or to comply personally with discovery orders. On the contrary, although he only had a few hours in port each week, the petitioner conscientiously submitted himself on three different occasions for physical examination by the respondent's doctor. He was deposed by the respondent and, within the time limitations inherent in his work as a seaman, he tried to ensure that the litigation proceeded in a timely manner.

It is conceded that a serious communication failure existed between Puerto Rican counsel for the petitioner so as to create confusion as to their respective roles in the case. It is conceded that counsel did not file answers to the respondent's interrogatories on time. No prejudice to the respondent was ever demonstrated. The question here presented is simply this: if sanctions were necessary, were there not sufficient alternatives to the drastic, harsh and irreparable extinguishing of a valid and justified cause of action by an American merchant seaman who demonstrated no recalcitrance and ought not the court to have considered facts in mitigation so as to determine the appropriate sanction?

Statement of Facts

Juan Corchado had suffered two serious knee injuries while working aboard the S.S. Fortelleza, owned and operated by respondent Puerto Rico Marine Management, Inc. He invoked the jurisdiction of the federal district court pursuant to the Jones Act, 46 U.S.C. §688 and elected, under that Act, to try the case to a jury. Through New York counsel Bernard Rolnick, Corchado retained Puerto Rican attorney Wilfredo Geigel who filed a complaint in the district court in Puerto Rico on March 21, 1980. The United States Marshal served the complaint in June 1980. The respondent filed an answer on July 8, 1980, together with discovery requests which included a lengthy set of interrogatories and a notice of deposition.

Corchado was deposed on August 13, 1980. He had previously contacted a second attorney, Harry Ezratty, asking him to handle the case. Ezratty refused to take over the case but agreed to consult with Geigel and to attend the deposition with Geigel. The nature of Ezratty's appearance at the deposition and his role in the case was to become a crucial factor in the court's decision to dismiss the case.

The respondent began filing motions to compel discovery on November 14, 1980, just prior to the time of the first status conference. The respondent claimed that the petitioner had repeatedly failed to appear for a physical examination (R66). Geigel refuted this allegation, informing the court that Corchado had appeared for the physical examination on three separate occasions despite the brief time he spent in port and had been kept waiting for several hours on each of these occasions without being seen (R77). At a status conference on November 20, 1980, the parties were given until January 16, 1981 to complete discovery; a pretrial conference was set for January 23, 1981.

On December 8, 1980, the respondent filed a motion to compel answers to its interrogatories. Geigel filed an informative motion which outlined the difficulties he experienced in meeting with Corchado (R81). The respondent's motion was denied and counsel for petitioner was given until December 15, 1980 to file answers and warned that sanctions might follow. On December 15, 1980, a trial date was set for February 17, 1981.

On December 23, 1980, the respondent filed a motion for sanctions. Geigel again informed the court of his continued difficulties in communicating with Corchado and the respondent's motion was denied. The petitioner was given until January 16, 1981 to file the answers. Because Geigel was about to leave Puerto Rico, Ezratty agreed to prepare the answers.

On January 23, 1981, Geigel filed a motion to withdraw as counsel and asked that the petitioner be given a reasonable time to retain new counsel (R98). The motion was granted at the pretrial conference on January 26, 1981, at which time the defense counsel claimed that Ezratty had entered the case in August 1980 since he had stated at Corchado's deposition that he was " co-counsel." Without any inquiry as to whether Ezratty had filed a formal notice of appearance with the court, the magistrate adopted the

respondent's statement as to Ezratty's role in the case and erroneously recorded an alleged notice of appearance as of August 1980, placing it on the docket five months later. *See* appendix, 30a.

At the pretrial conference, the respondent filed a motion for sanctions for failure to answer the interrogatories. However, defense counsel was fully aware that the answers had, in fact, been prepared. He failed to so inform the magistrate who consequently recommended dismissal of the complaint for failure to comply with discovery orders (R103). Geigel filed his objections timely on February 2, 1981, asked for reconsideration and prayed that the magistrate's recommendations be not adopted (R105). He pointed out that the answers were delivered and that the defense counsel's silence at the pretrial conference misled the magistrate. Upon the objections being filed, the district judge was bound by law, 28 U.S.C. §636(b)(1), to make a *de novo* determination of those portions of the report of the magistrate to which objections were made. The court failed to do so and instead adopted the magistrate's recommendation without such *de novo* determination on February 11, 1981.

As of February 11, 1981, the date of the status conference before Judge Gierbolini, Geigel was no longer in the case but Ezratty had not entered his appearance. No one appeared for Corchado who was, therefore, without legal representation when the district judge, without a hearing, dismissed the complaint with prejudice by expressly adopting the magistrate's recommendation in spite of the fact that, as the judge himself noted, the answers to the interrogatories had been delivered (R113).

On February 25, 1981, Ezratty filed an omnibus motion for reconsideration pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. He brought to the court's attention, the following considerations:

"1. The interrogatories were ready and have in fact been served. The Magistrate was unaware of this when he made his recommendations.

2. At the Pre-Trial Conference, the Magistrate was misinformed that my office was representing the plaintiff. Pursuant to our agreement I was not to assume representation until this matter was resolved.

3. The status of plaintiff as a ward of this Court was not brought out to the Magistrate's attention in an effort to ameliorate his recommendation.

4. The seriousness and permanence of plaintiff's injuries were not set forth to the Magistrate or this Court.

5. This Court was under the impression that I was a substituted attorney and failed to appear at the Status Conference in contempt of this Court. As previously pointed out, this was not true."

Geigel also filed a motion for reconsideration. Both motions were vigorously contested by the respondent. The court expunged Geigel's motion although it contained facts relevant to the question of counsel's "willfulness." *See* appendix, 31a. At no time was petitioner's personal willfulness a question.

Clearly, there were questions of fact seriously in dispute. Yet, on April 13, 1981, without a hearing, the court denied Ezratty's Rule 60(b) motion on the grounds that the record showed a "clear case of flagrant bad faith on the plaintiff's part." (R150). The judge stated incorrectly that the complaint had been filed in

February 1980 and that "more than a year later still discovery is not completed." (R149). This factual error in the procedural history of the case belies the judge's purported close scrutiny of the record. He dismissed the case without any hearing only seven months after the answer had been filed.

Ezratty filed a motion to amend findings pursuant to Rule 52(b) which was denied as untimely. The First Circuit Court of Appeals, using Rule 41(b) as the source of its authority, held that the district court had not abused its discretion when it dismissed the case, that no hearing was necessary and further held that: "We find no merit in the argument that plaintiff as a seaman is a ward of the Court, and therefore deserves special treatment." (footnote omitted) (12a).

REASONS FOR GRANTING THE WRIT

I.

There is a conflict among the circuits as to the proper standards and procedures which must precede imposition of dismissal under Rule 37(b) of the Federal Rules of Civil Procedure in order to safeguard a litigant's due process rights.

The ruling of the court of appeals poses a question as to the proper application of Rule 37(b) of the Federal Rules of Civil Procedure following this Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639. It is submitted that the court of appeals has sanctioned a departure by the district court from the accepted and usual course of judicial proceedings which requires the exercise of this Court's power of supervision.

While purporting to limit its review to the question of whether the district court had abused its discretion for dismissing the case

under Rule 37(b), the court of appeals in fact determined *de novo* that the attorney's conduct fell within the ambit of Rule 41(b) as well. In reliance on this Court's decision that under Rule 41(b) "when circumstances make such action appropriate a district court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting," *Link v. Wabash Railroad Company,* 370 U.S. 626, the First Circuit has here held that no hearing was necessary prior to dismissal. The ruling, on the face of it, is in direct conflict with this Court's decision in *Societé Internationale v. Rogers,* 357 U.S. 197 wherein this Court explicitly stated that "whether a court has power to dismiss a complaint because of non-compliance with a production order depends exclusively upon Rule 37 . . . ." at p. 207.

Not only did the court of appeals erroneously rely on the *Link* decision, it failed to mention the discussion therein of Rule 60(b) as a corrective remedy for lack of notice and hearing. In *Link,* the petitioner had not availed himself of this remedy. The petitioner herein most certainly did; but his motion for reconsideration was denied — without a hearing — on the grounds that his attorneys' conduct merited the severe penalty of dismissal irrespective of any mitigating factors. The district court failed to consider lesser sanctions. The First Circuit has herein affirmed this harsh result without any consideration of the remedial purpose of Rule 60(b). *See* 7 Moore's *Federal Practice,* ¶60.22[2]. The decision is inconsistent, therefore, with this Court's traditional concern for preserving the due process rights of litigants. *Hovey v. Elliott,* 167 U.S. 409, *Hammond v. Arkansas,* 212 U.S. 322; *Societé Internationale v. Rogers, op. cit.; National Hockey League, op. cit.; Universal Oil Products Co. v. Root Refining Co.,* 326 U.S. 575.

The ruling of the court of appeals suggests that in the First Circuit, deterrence overrides due process, thus bespeaking the need

for this Court's guidance as to the proper balance between the due process rights of litigants and a district court's mandate to effect the just, speedy and inexpensive determination of every action. Rule 37 empowers the court to make such orders "as are just." The question at issue is what is it that constitutes a full consideration of the record on the issue of whether to impose dismissal as a just sanction so as to be within the permissible range of the court's discretion.

This Court has held that when the term discretion is "invoked as a guide to judicial action, it means a sound discretion, that is to say a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result." *Langnes v. Green,* 282 U.S. 531. There is a test for the exercise of discretion under Rule 37. It is that Rule 37 "should not be construed to authorize dismissal of [a] complaint because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability and not to willfulness, bad faith, or any fault of petitioner." *Societé Internationale, op. cit.* at 212. It is submitted that where there are factual disputes, failure to hold a hearing to determine the reasons for non-compliance is an abuse of discretion. *See* Renfrew, *Discovery Sanctions,* 67 Cal. Law Rev. 1062 (1979). The First Circuit's countenance of such abuse conflicts with the express policies which govern appellate review in other circuits.

It is the policy in three circuits to examine the extent to which the petitioner, as distinguished from his counsel, was personally responsible for the non-compliance with discovery orders. *See Rogers v. Kroger Company,* 669 F.2d 317 (5th Cir. 1982) and cases cited therein; *Joplin v. Southwestern Bell Telephone Company,* 671 F.2d 1274 (10th Cir. 1982); *Butler v. Pearson,* 636 F.2d 526 (D.C. Cir. 1980).

Further, other circuits routinely examine whether the lower court had considered lesser sanctions, whether new counsel had entered the case, the extent to which the opposing party was at fault, the degree of actual prejudice to the respondent, and the length of time the case had been on the docket prior to dismissal. A decision to dismiss a case in the absence of one or more of these factors has been held to constitute an abuse of discretion by at least four circuits. *Rogers v. Kroger Company, op. cit., passim; Nealy v. Transportacion Maritima Mexicana,* 630 F.2d 694 (9th Cir. 1980); *EEOC v. Carter Carburetor,* 577 F.2d 43 (8th Cir. 1978), *cert. denied,* 439 U.S. 1081 (1979); *Schenck v. Stearns,* 583 F.2d 60 (2nd Cir. 1978).

The basis for the court of appeals' refusal herein to apply any of the aforementioned criteria to the orders of the district court has not been explained. That the ruling sanctions the "mere punishment" which so offends due process is clear: "We realize that we are visiting the sins of the attorneys upon the client, but this is an unavoidable side effect of the adversary system." *See* appendix, page 11a. This policy is radically in conflict with the decisions of other courts of appeals, suggesting that this Court's guidance as to the "permissible scope to be accorded sanctions under Rule 37 and under what circumstances sanctions should appropriately be applied" continues to be necessary.

II.

The decision below raises a serious problem with respect to the proper application of Rule 37(b) to cases involving the rights and remedies of American merchant seamen who have been, historically, wards of the court and are specially protected by federal law.

The court of appeals has said that "we find no merit in the argument that petitioner as a seaman is a ward of the court and

therefore deserves special treatment." *See* appendix, page 12a. With respect to the status of the petitioner as a ward of the court, the ruling is in direct conflict with this Court's decisions in *Harden v. Gordon,* 11 F. Cas. 480; *Garrett v. Moore-McCormack Co.,* 317 U.S. 239; *Oil, Chemical and Atomic Workers International v. Mobil Oil Co.,* 426 U.S. 407. *See as well,* Norris, *Law of Seamen,* 3rd Ed., §503 (1970).

As to the issue of whether the petitioner was deserving of "special" treatment, it is submitted that the court of appeals has herein misconstrued the nature of the wardship theory which traditionally governs the treatment of seamen. It is "beneficient" treatment to which seamen have been entitled as a matter of law, signifying, at the very least, a recognition that their problems with respect to participation in the legal system differ from those of landbased workers.

The Third Circuit cases to which the court of appeals referred are inapposite to its position. In both those cases, the appellate court affirmed dismissals under Rule 41(b) only after balancing the plaintiff's entitlement to beneficent treatment against the lower court's responsibility to secure a just, speedy and inexpensive determination of every action. *Kenney v. California Tanker Company,* 381 F.2d 775 (3rd Cir. 1969); *Torino v. Texaco, Inc.,* 378 F.2d 268 (3rd Cir. 1967). What distinguishes both these holdings from this one is that the plaintiffs, not counsel, had been to blame for the failure to prosecute. That the petitioner herein should suffer the same penalty when he has been characterized as the "victim" of his attorneys' conduct, suggests that in the First Circuit, the rights and remedies of American merchant seamen are in serious jeopardy.

Insofar as determining whether the petitioner was at fault, there was evidence to the contrary. Although on shore but once a week, he had submitted himself to a physical examination by

the respondent's doctor on three occasions without being seen. To label the doctor's failure to see the petitioner as a "discovery dereliction" on the petitioner's part is contrary to fact, suggesting that no amount of effort on the petitioner's part to comply with the orders of the district court could mitigate the alleged wrongful behavior of his counsel so as to reduce the penalty.

The effect of the ruling herein has been to deprive the petitioner of his right to a jury trial under the Jones Act, 46 U.S.C. §688. The remedial purpose of this legislation never entered the court's thinking. Consequently, the pre-eminent role of the jury in Jones Act cases was not considered by the court. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 360; *Jacobs v. New York City,* 315 U.S. 752; *Ferguson v. Moore-McCormack Lines,* 352 U.S. 521; *Braen v. Pfeiffer Oil Transport Co., Inc.,* 361 U.S. 129; *Johannssen v. Gulf Trading & Transportation Co.,* 633 F.2d 653 (2nd Cir. 1980). It is submitted that the court of appeals' refusal to consider the petitioner's status as a ward of the court is contrary to his rights as a matter of law.

CONCLUSION

In view of these considerations, the petitioner respectfully submits that this petition be granted.

Respectfully submitted,

BERNARD ROLNICK
Attorney for Petitioner
Counsel of Record

PETER J. DEAN
JANE ROLNICK GOLDBERG
Of Counsel